No. 150

IN THE

Supreme Court of the United States

October Term, 1948

J. W. KIRKLAND, H. H. GARRISON, *et al.*,
Petitioners,

—VS.—

ATLANTIC COAST LINE RAILROAD COMPANY, A VIRGINIA CORPORATION, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, NATIONAL MEDIATION BOARD, AND FRANK P. DOUGLASS,
Respondents.

REPLY BRIEF FOR PETITIONERS

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SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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INTRODUCTION.

The petition for writ of certiorari, and petitioners' brief in support thereof, outline a single basic issue, which is substantially as follows: Whether judicial review is available, in view of the Administrative Procedure Act (5 U.S.C. 1001 *et seq.*), with respect to a decision of the National Mediation Board which construed the Railway Labor Act (45 U.S.C. 151 *et seq.*) as requiring carrier-wide collective bargaining units in all cases and therefore grouped petitioners and other engineers on the Western Division (formerly a separate carrier) of the Atlantic Coast Line Railroad with the much larger group of engineers on the Atlantic Coast Line proper for purposes of an election to choose a single collective bargaining representative, with the result that petitioners were over-ridden and the Western Division engineers, including petitioners, were deprived of their

long-standing right to have a collective bargaining representative of their own choice.

Respondents National Mediation Board and Frank P. Douglass (hereinafter for convenience referred to collectively as the "Mediation Board"), and the Brotherhood of Locomotive Engineers ("BLE") have filed briefs seeking to support the judgment of the lower court denying judicial review. The brief of the Mediation Board discusses, sketchily and inaccurately, the issue as presented by petitioners and as acted upon by the lower court, while the brief of the BLE attempts to evade the real issue and seeks to raise entirely new issues, in substance as follows:

(1) The BLE erroneously asserts (its brief, pp. 7-12) that petitioners have failed to prove (although they so alleged in their complaint and the allegations were admitted by respondents' motions to dismiss) that the Mediation Board in fact declined to exercise its statutory discretion because it considered itself bound by its construction of the Railway Labor Act as requiring carrier-wide bargaining units in all cases, and therefore the Board must be presumed to have acted properly;

(2) The BLE erroneously asserts (its brief, pp. 12-15) that (contrary to the position of petitioners throughout this case that they desire only to free the Mediation Board from a mistaken and self-imposed restriction on its discretion) petitioners are seeking "to compel the Board to certify a unit which is less than carrier wide," and are asking for a "construction of the Railway Labor Act whereby less than carrier-wide units are mandatory," and, having manufactured that purely fictitious statement of position attributed to petitioners, the BLE seeks to refute it by pointing out that a court could not so control administrative discretion.

This reply brief will be devoted to a discussion of only a few of the points raised in the brief of the respondents, all other points having been adequately answered in petitioners' original brief.

SUMMARY OF ARGUMENT.

I.

There is no merit in the contention of the BLE that petitioners have failed to present properly the issue of the Board's failure to exercise its statutory discretion.

Petitioners specifically alleged in their complaint that the Board proceeded "upon a construction of the Railway Labor Act to the effect that all persons engaged in one type of work and employed by one carrier must be organized into one craft or class and choose one representative for collective bargaining purposes (carrier-wide representation)." Petitioners were and are prepared to prove that allegation by good and sufficient evidence. Petitioners were denied an opportunity to prove that allegation when the District Court dismissed the petition. Respondents, by filing motions to dismiss, admitted that factual allegation and are now in no position to attack the accuracy of the facts so admitted. The BLE, by its motion to dismiss, has sought to avoid a hearing in which this proof would be introduced. For purposes of this appeal, the Court should assume petitioners' allegations to be correct as admitted by respondents. In order, however, to clear up any doubt as to petitioners' ability to prove that allegation, petitioners append to this brief copies of certain documents (Supplements A, B, C and D) contained in the Board's files establishing that the Board in fact did not exercise its discretion, but erroneously held itself, as a matter of law, to be without discretion as alleged by the petitioners.

II.

There is no merit in the contention of the BLE that petitioners are seeking to control the Board's discretion and to compel the Board to certify a less-than-carrier-wide unit.

Petitioners have repeatedly pointed out (*e. g.*, Petition, pp. 4-5) that they "did not ask the trial Court to control the Board's discretion in any way," and that "The Court was asked simply to inform the Board that it has the legal power and discretion, under the Act, to establish less-than-carrier-wide crafts or classes in cases where it finds that the facts warrant such action." Since petitioners are seeking simply to obtain *freedom of discretion* for the Board, as opposed to the Board's present belief that it has no discretion, it seems clear that this is an appropriate case for judicial review in order that the Board may be informed of the full extent of its discretion. In this view, the introductory paragraph of Section 10 of the Administrative Procedure Act, which exempts from review administrative action which is "by law committed to agency discretion," has no application to this case, since the purpose of this proceeding is to declare that the agency has discretion where it erroneously believes that it has none, and not to control the exercise of agency discretion.

Ludecke v. *Watkins*, 68 Sup. Ct. 1429 (U. S. 1948) is not germane to this issue, as in that case the agency (the President acting through the Attorney General) had exercised the discretion granted by statute, whereas here the Board has held that it has no discretion to consider less-than-carrier-wide units.

III.

There is no merit in the contention of the Mediation Board that judicial review is not available in this case.

Contrary to the assertion of the Mediation Board, the Supreme Court's language in the *Switchmen's Union* case (*Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943)) makes it clear that the Court in that case merely refused to "supply" or "infer" a right of review with respect to certification proceedings, and did not find that the Railway Labor Act "precludes" review. In so deciding, the Supreme Court relied on many factors which do

not appear on the "face" of the Railway Labor Act,—factors which cannot be considered in construing that Act under the Administrative Procedure Act. Numerous indications in the legislative history of the Administrative Procedure Act demonstrate that Congress intended to provide for review of employee representation cases, and certainly did not think that such review was "precluded" by the Railway Labor Act. Since such review is not precluded, but on the contrary was clearly contemplated by Congress in passing the Administrative Procedure Act, the decision of the Supreme Court in the *Switchmen's Union* case is not authority for denying review.

ARGUMENT.

I.

There Is No Merit in the Contention of the BLE That Petitioners Have Failed to Present Properly the Issue of the Board's Failure to Exercise Its Statutory Discretion.

The BLE, apparently realizing that it is unable to make a *substantive* answer to the contentions of petitioners, has sought to raise a *procedural* objection to the manner in which petitioners have presented their case to the Board and to the Courts. The BLE alleges that petitioners failed to obtain a ruling from the Board which will support petitioners' allegations that the Board felt bound by an erroneous interpretation of the Act and therefore refused to exercise its discretion in determining the craft or class in which petitioners were placed.

Petitioners had supposed that the proper method of *proving* that the Board declined to use its discretion would be to submit *at the trial* documents and other material showing the basis on which the Board proceeded. In that view of the proper procedure, petitioners assumed that the BLE's motion to dismiss would perform the usual function of a

general demurrer, and would admit, among other things, petitioners' allegations (R. 7) that the Board proceeded "upon a construction of the Railway Labor Act to the effect that all persons engaged in one type of work and employed by one carrier must be organized into one craft or class and choose one representative for collective bargaining purposes (carrier-wide representation)," and (R. 8) that the Board decided "that it is required by the provisions of the Railway Labor Act to combine all of the engineers employed by the A. C. L., including the Western Division, into one craft or class for representation purposes." As petitioners understood the motion to dismiss, the BLE was asserting that, even though the Board proceeded on an erroneous interpretation of the Act and therefore did not use its discretion, petitioners had not stated a cause of action.

Now it appears that the BLE is seeking to use its motion to dismiss for an entirely novel purpose—namely, to attack the accuracy of the *factual* statements contained in petitioners' complaint. Such is improper procedure on a motion to dismiss.

In adopting this unprecedented approach, the BLE relies (its brief, pp. 8-9, note 4) on certain documents not yet in the record,—documents which undoubtedly will be produced at the trial after the motions to dismiss have been overruled. The BLE asserts (*ibid.*) that this Court may take judicial notice of such documents because they are in the official files of the Board.

If the BLE is correct in its assertion as to this Court's power to take judicial notice of the Board's records, then the Court may also take judicial notice of certain additional documents, not mentioned by the BLE, which likewise are in the Board's files and which demonstrate beyond question that petitioners' allegations are true and that the Board in fact failed and declined to exercise its discretion in this case. Petitioners expect to introduce these documents in

evidence at the hearing. Whether or not the Court may judicially notice the documents to which the BLE refers in its brief, petitioners deem it appropriate to include in this brief, for whatever use the Court may see fit to make thereof, the documents from the Board's files which establish the accuracy of petitioners' allegations. Reference to such documents at this time seems necessary in view of the persistent attempt of the BLE to evade the real issue of this case by raising a doubt in the Court's mind as to the validity of petitioners' contentions and the availability of proof to support petitioners' allegations.

The documents which establish that the Board did not exercise its discretion in this case are set out in Supplements A, B, C and D to this brief. Those documents consist of:

Supplement A: Letter of October 12, 1946 addressed to National Mediation Board from D. B. Robertson, President of the Brotherhood of Locomotive Firemen and Enginemen, requesting that the Board explain its ruling with respect to craft or class in this case.

Supplement B: Letter of October 16, 1946 from Robert F. Cole, Secretary of the Mediation Board, to Mr. Robertson, acknowledging receipt of letter of October 12, 1946.

Supplement C: Letter of November 13, 1946 from Secretary Cole, "By direction of the National Mediation Board," to Mr. Robertson explaining the basis on which the Board proceeded in this case.

Supplement D: Excerpts from decision of the Board in Case No. R-690, referred to in the Board's letter of November 13, 1946.

It appears from the documents in the supplements to this brief that the Board notified (Supp. A) various parties involved in the election that "It is the Board's consistent policy in representation elections to require that all employees in a particular craft or class on a carrier are en-

titled to participate in any determination of the representative of the craft or class, for the purposes of the law." With respect to that statement, the Board was specifically asked (Supp. A) whether it meant "that when deciding whether to entertain the BLE's application, it considered itself required by law, to-wit, the Railway Labor Act, to combine all of the engineers employed by the ACL RR, including the Western Division thereof, into one craft or class, and be represented by one representative."

The Board replied (Supp. C):

> "In direct response to your inquiry as to whether the Board considers itself required by the Railway Labor Act to combine all of the engineers employed by the Atlantic Coast Line Railroad, including the Western Division thereof, into one craft or class for representation purposes, the answer is in the affirmative. In this connection you are respectfully referred to page 15 of the Findings in Case R-690 wherein reference is made to the Board's letter of February 17, 1937 to Mr. Walber of the New York Central Railroad Company, in an earlier case, R-161, as well as the specific Findings in Case R-690, copy of which is enclosed."

It should be noted that this reply was given "By direction of the National Mediation Board."

The reference in the Board's reply to the "Findings in Case R-690" is to the administrative stage of the *Switchmen's Union* case (*Switchmen's Union* v. *National Mediation Board*, 77 App. D. C. 264, 135 F. (2d) 785 (1943), *aff'd*, 320 U. S. 297 (1943)). In that case both the majority and dissenting justices in the Court of Appeals assumed that the Board's action was predicated on its interpretation of the law, not on the exercise of its administrative discretion. As the majority said (77 App. D. C. 275, 135 F. (2d) 796), the Board "determined it had no discretion to deny the request of the majority of the yardmen employed by the Railroad Company to appoint a representative for their craft."

Mr. Justice Rutledge, dissenting, stated (77 App. D. C. 281, 135 F. (2d) 802) that the Board "decided as a matter of law that the statute required carrier-wide crafts as the voting unit."

In the Supreme Court the same assumptions were made by both majority (320 U. S. 304) and dissenting (320 U. S. 311) justices, the majority holding that, in the absence of an expression from Congress (such as is supplied by the Administrative Procedure Act), no judicial review would be "supplied" or "inferred" even with respect to erroneous interpretations of law by the Board.

In this case, the Board not only has stated specifically that it "considers itself required by the Railway Labor Act to combine all of the engineers employed by the Atlantic Coast Line Railroad, including the Western Division thereof, into one craft or class for representation purposes," but it has given, as the *only* reason for that conclusion, its prior interpretation of the Act in the *Switchmen's Union* case. This makes it doubly clear that the Board acted on its erroneous interpretation of the Act, and not on any discretionary finding on the facts that a carrier-wide unit would be more appropriate in this case than any possible smaller unit. In view of this, there is no possible substance in the argument of the BLE (its brief, pp. 7-12 and footnotes) that the Board must be presumed to have exercised its discretion, and that it has selected carrier-wide units only because of considerations of "policy."

The excerpts from the Board's decision in the *Switchmen's Union* case contained in Supplement D to this brief clearly show that the Board did not exercise discretion in that case, and the Courts so assumed on review (see discussion of Courts' opinions above). Here it is even more obvious that the Board did not use the discretion given it by the statute, as the Board gives no reasons based on the facts of this case for its decision establishing a car-

rier-wide unit, but rather relies entirely on its *legal* interpretation in another case (the *Switchmen's Union* case).

The foregoing would seem to constitute sufficient answer to the novel and specious contention of the BLE that the Board must be presumed to have exercised its discretion properly.

II.

There Is No Merit in the Contention of the BLE That Petitioners Are Seeking Judicial Control of the Board's Discretion and That Therefore No Review Should Be Granted.

The persistence of the BLE in avoiding the only issue in this case as presented by petitioners and as recognized by the Court of Appeals and the respondents Mediation Board and Frank P. Douglass, is somewhat remarkable. While all other parties, and the Courts, have recognized that the issue is whether judicial review is granted by the Administrative Procedure Act to correct an erroneous statutory interpretation by the Mediation Board, or whether, on the other hand, judicial review is "precluded" by the Railway Labor Act, within the meaning of the introductory paragraph of Section 10 of the Administrative Procedure Act, the BLE refuses to discuss that issue (see its brief, pp. 14-15), but insists upon discussing non-existent issues. The only conclusion which can be drawn from that conduct on the part of the BLE is that it does not agree with the position taken by the Mediation Board and by the lower court with respect to reviewability in this case, and therefore is determined to avoid the issue completely.

The second fictitious issue advanced by the BLE is stated as follows (see its brief, pp. 12-14): "Petitioners seek, by their complaint, not to have the Board exercise a discretion as to the bargaining unit but to compel the Board to certify a unit which is less than carrier wide. In thus seeking a construction of the Railway Labor Act whereby less than

carrier-wide units are mandatory, petitioners summarize their arguments here as follows (petition 15):

> The National Mediation Board's action in placing petitioners in a carrier-wide craft or class would result in destroying a smaller collective bargaining unit which has existed for over thirty-five years, and consequently in destroying the rights of petitioners to bargain with their employer through a representative of their own choosing and to have the employer treat with that representative and with no other.

Such is the first argument in their supporting brief. Petitioners thus do not seek to have the Board exercise its discretion, or to present facts which may bear thereon, but seek instead the exact contrary."

The simple answer to that statement of the BLE is that the petitioners have taken no such position. Petitioners' position is summarized at pages 4-5 of its petition for certiorari:

> "It should be emphasized that petitioners did not ask the trial Court to control the Board's discretion in any way. The Court was not asked to order the Board to withdraw its certification of the B. L. E., to establish a separate class or craft embracing only the engineers on the Western Division of the A.C.L., or to take any other action to influence the Board's decision on the merits. The Court was asked simply to inform the Board that it has the legal power and discretion, under the Act, to establish less-than-carrier-wide crafts or classes in cases where it finds that the facts warrant such action. Petitioners are confident that if the Board is freed of its self-imposed inhibition against the exercise of its statutory discretion in this respect, it will voluntarily correct the erroneous certification involved in this case (R. 10). Petitioners contend that they are entitled to have the Board act in the matter of certification free of any misapprehension that the Board is without discretion in making its decision."

Again, at page 19 of petitioners' brief in support of its

petition, it is pointed out: "Petitioners urged that the legislative history of the Railway Labor Act clearly shows a Congressional intention that the Board should not be restricted in any manner, geographical or otherwise, in its choice of a bargaining unit."

And again at page 20 of that brief, petitioners state:

> "Congress intended the term 'craft or class' to be flexible, both geographically and otherwise, in order that the Mediation Board could, in its discretion, certify carrier-wide or less-than-carrier-wide units as the facts of each case might require. The failure of the Board to exercise that discretion necessitates the declaratory relief here sought by petitioners. Such relief will not *require* the Board to certify any particular organization or to designate any particular bargaining unit. It will simply free the Board from the erroneously self-imposed inhibition (resulting entirely from its misconstruction of the Act) against designation of smaller units. Whether originally independent railroad segments, such as the Western Division of the A. C. L., are to be treated separately or not will depend entirely on the sound discretion of the Mediation Board exercised in the light of all the facts of each case."

Further examples of petitioners' position on the Board's discretion might be cited, but the foregoing clearly demonstrates the fallacy in the issue sought to be created by the BLE.

It is true that, in order to place the legal issue in proper focus, petitioners have assumed throughout the petition and brief that the Mediation Board's interpretation of the law was erroneous and that, if the Mediation Board were informed by the Court that it has full discretion, it would rule in favor of petitioners on the substantive issue. Obviously, such an assumption is necessary in view of the motions to dismiss and the manner in which the case was handled by the lower courts. This is explained at page 24 of petitioners' brief in support of its petition. Such assumptions certainly cannot fairly be construed as a re-

quest for a judicial direction to the Board to certify a less-than-carrier-wide bargaining unit, particularly when petitioners' position with respect to the Board's discretion is clearly stated repeatedly throughout the petition and brief.

Since petitioners in this proceeding are not seeking to interfere with the Mediation Board's exercise of discretion, but are asking merely for a declaration of the existence of a discretion now denied by the Board, there is no substance to the second and last point urged by the BLE. Judicial review is appropriately invoked to free an administrative agency from erroneously self-imposed restrictions on discretion. See *Cotonificio Bustese, S. A.* v. *Morgenthau,* 74 App. D. C. 13, 121 F. (2d) 884 (1941): "... where an administrator erroneously holds himself to be without power to consider a claim, relief in the nature of mandamus generally may be given." See also *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 197 (1941); *National Benefit Life Ins. Co.* v. *Shaw-Walker Co.,* 71 App. D. C. 276, 286, 111 F. (2d) 497, 507 (1940).

The BLE seeks to derive comfort from the provision in Section 10 of the Administrative Procedure Act exempting from judicial review agency actions which are "by law committed to agency discretion." As demonstrated above, the Mediation Board did not exercise its statutory discretion, but on the contrary held that it had no discretion. Clearly, therefore, the quoted language from Section 10 of the Administrative Procedure Act is inapplicable. Once the Board has exercised its discretion it will be soon enough for the BLE to argue that judicial review is not available, although the history of the Administrative Procedure Act shows that the exemption of discretionary matters was intended to apply only in cases where a statute clearly confers "unlimited" discretion (Senate Document 248, pp. 212, 275, 368, 370; see *Ludecke* v. *Watkins, supra,* 68 Sup. Ct. at 1431), and did not purport to prevent judicial review of questions of law (Senate Document 248, p. 275). More-

over, it appears that the agency's exercise of discretion must be "based on sound reasoning" and cannot be "an arbitrary discretion" (Senate Document 248, p. 311). See also Senator McCarran's article, quoted at pages 32-34 of petitioners' brief, where it is pointed out that the intent and effect of the Administrative Procedure Act was to "cut down the 'cult of discretion' so far as federal law is concerned."

In any event, the Mediation Board has not yet exercised its statutory discretion and certainly the Administrative Procedure Act does not prohibit a court from declaring the existence of an administrative discretion which is denied by the agency itself. Indeed, that Act (Section 10 (e)), and the legislative history (Senate Document 248, p. 214), clearly show that courts, not agencies, are to decide all questions of law in the final analysis.

In passing, it may be observed that *Ludecke* v. *Watkins, supra,* relied upon by the BLE (its brief, p. 14), is not inconsistent with petitioners' position in this case. There the administrative discretion was exercised as authorized by the statute, and the only possible questions were whether the statute was applicable, was constitutional or actually conferred the very broad discretion there exercised. Here there is no question as to the applicability or constitutionality of any statute, and the Board did not exercise the broad discretion granted it by the statute. Clearly the Court has the power in this case to say that the Board has a broad discretion which it did not exercise, just as it said in *Ludecke* v. *Watkins, supra,* that the President had a broad discretion which he did exercise.

III.

Other Contentions of Respondents Are Without Substance.

The petitioners do not wish to burden the Court with a tedious refutation of the arguments advanced in the reply

briefs of the respondents. Those arguments, except as discussed above, were largely anticipated in the petitioners' original brief. Therefore only brief reference will be made to a few points made by respondents.

The Mediation Board relies heavily (its brief, pp. 6-7) on the fact that the original draft of the introductory clause of Section 10 of the Administrative Procedure Act excepted judicial review where "statutes expressly preclude" it, and the word "expressly" was later deleted. This argument is answered in detail at pages 34-39 of petitioners' brief, specific reference to the deletion appearing at page 37. As noted there, it may well be that the word "expressly" was deemed by Congress to be redundant, since the word "statutes" at various points in the Act was regarded as the equivalent of "express statutory provisions." In any event, Congress made clear its intention that judicial review could not be denied except where the "face" of the statute itself gives "clear and convincing evidence of an intent to withhold it" (Senate Document 248, p. 275).

Attention is also called to the quotation, at page 49 of the petitioners' brief, from the decision of the Circuit Court in *United States ex rel. Trinler* v. *Carusi*, 166 F. (2d) 457 (C.C.A. 3d, 1948), where the Court said: "The elimination of the word 'expressly' in the bill which finally became law has no significance other than to indicate that the failure of the basic statute to contain the exact words 'precludes review' is not conclusive."

The Mediation Board also relies (its brief, pp. 7-8) on an advance interpretation of the Administrative Procedure Act by the Attorney General, which is said to indicate that Section 10 did not change existing law respecting judicial review, and the Mediation Board asserts that the Attorney General's statements were uncontradicted in Congress. That argument is answered in detail at pages 43-48 of petitioners' original brief, where numerous specific statements by Congressional leaders, demonstrating their inten-

tion that judicial review should be available in this type of case, are set out. The Mediation Board has sought (its brief, p. 8, footnote 2) to brush those statements aside with the assertion that they are mere "general statements." The discussion in petitioners' brief demonstrates that those statements are most specific and pertinent to the point here in issue.

The Mediation Board also relies (its brief, pp. 8-9, footnote 2) on Senator McCarran's statement that the Administrative Procedure Act was not intended to "abrogate acts of Congress" (Senate Document 248, p. 311). The Mediation Board's argument begs the question completely, just as did the opinion of the Court of Appeals, as the question obviously is whether "statutes preclude" review where they merely fail to provide specifically for it, and where courts consequently refuse to "supply" review. If, as petitioners firmly believe, and as is demonstrated in petitioners' original brief, the Railway Labor Act does not "preclude" review, plainly the Administrative Procedure Act does not "abrogate acts of Congress" by conferring review in this case.

The Mediation Board seeks (its brief, p. 9) to derive support from the express refusal of Congress (Senate Document 248, p. 38) to exempt certification proceedings from judicial review under Section 10 of the Administrative Procedure Act. Obviously, such refusal supports the position of petitioners, as it shows that Congress desired such cases as this to be within judicial cognizance. Moreover, in refusing to exempt such proceedings, the Senate Judiciary Committee went further and stated (Senate Document 248, p. 38) that under the Administrative Procedure Act judicial review *could not be denied* unless the Courts should find that "subsequent review in enforcement proceedings is 'adequate.'" Since review in enforcement proceedings would not be "adequate" to protect the interests of petitioners (see petitioners' brief, p. 29), plainly judicial review cannot

be denied in this case in view of the Congressional mandate (see full discussion on this point in petitioners' brief, pp. 28-31).

The Mediation Board attempts (its brief, pp. 9-10) to belittle the numerous instances discussed by petitioners (petitioners' brief, pp. 43-47) in which Congressional leaders made clear their intention that the "defect" of nonreviewability disclosed in the *Switchmen's Union* case should be corrected by the Administrative Procedure Act. The Mediation Board fails to discuss most of such instances, and it erroneously contends (its brief, p. 10) that Senator McCarran's statement on the subject in response to questions of Senator Austin (Senate Document 248, p. 311) referred "only to the question of who has standing to obtain judicial review." The complete answer to that contention is contained in the colloquy between Senator McCarran and Senator Austin:

> "Mr. Austin. Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
>
> "Mr. McCarran. That is correct.
>
> "Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?
>
> "Mr. McCarran. That is true; the Senator is entirely correct in his statement."

Obviously, Senator McCarran was *not* referring merely to cases which he had previously mentioned (Senate Document 248, p. 310) relating to "standing to obtain judicial review." The only cases to which he possibly could have been referring—cases where judicial review was denied "because the statute did not provide for a review"—were the *Switch-*

men's Union case, and the somewhat similar cases cited by the Attorney General (Senate Document 248, p. 230; see full discussion in petitioners' brief, pp. 43-45).

The Mediation Board states (its brief, p. 10) that Section 10 of the Administrative Procedure Act "does not purport to answer all of the detailed and often difficult questions that arise as to what is reviewable and by whom, when, and in what court. Those complexities, which have often been alluded to by this Court, e. g. *Stark* v. *Wickard*, 321 U. S. 288, 306, 312, were well known to the draftsmen of the Administrative Procedure Act." Whatever "difficult questions" may be left unanswered by Section 10, one is answered quite clearly, and Congressman Walter referred to *Stark* v. *Wickard* in emphasizing the importance of the answer. Congress has made it perfectly clear (Senate Document 248, p. 275) that, contrary to the reasoning in the *Switchmen's Union* case and in the dissent in *Stark* v. *Wickard*, "The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review," and that a statute precludes review only when, upon its "face," it gives "clear and convincing evidence of an intent to withhold it." And Congressman Walter stated (Senate Document 248, p. 368) that absence of an express provision for review "would be completely immaterial," citing with evident disapproval the dissent in *Stark* v. *Wickard*, in which the reasoning of the *Switchmen's Union* decision was advanced as a basis for denying review (see full discussion in petitioners' brief, pp. 45-46; also pp. 39-43).

The Mediation Board seeks to derive comfort (its brief, p. 11) from a most general statement by Mr. Carl McFarland, which is merely, in substance, that the "principle" and the "extent" of judicial review could and should not be "greatly altered." Such remarks could hardly be construed to oppose the position of the petitioners that the *availability* of judicial review is extended in the particular

here involved. Mr. McFarland is quoted more pointedly by petitioners (petitioners' brief, p. 34) as stating that the Administrative Procedure Act "alters the entire cast and setting of the subject" of " 'both the availability and scope of judicial review' "; and as stating (petitioners' brief, p. 38), a year after the *Switchmen's Union* decision, that "Judicial review has been forbidden by Congress in few instances including, and perhaps limited to, decisions of the Administrator of Veterans' Affairs." Moreover, as noted above, Mr. McFarland, as counsel for the BLE in this case, has declined to support (or discuss in any manner) the position of the Mediation Board that judicial review is here "precluded" within the meaning of the introductory clause of Section 10 of the Administrative Procedure Act (BLE brief, pp. 14-15).

Ludecke v. *Watkins, supra,* cited by the Mediation Board (its brief, p. 12), does not stand for the proposition that a "statutory preclusion" of judicial review may be ascertained from sources apart from "clear and convincing evidence" appearing on the "face" of the statute itself. There non-reviewability was based on the fact that Congress had conferred "unlimited" discretion—a fact appearing on the "face" of the statute. In terms of the Administrative Procedure Act, the case would more appropriately be classed as one where "agency action is by law committed to agency discretion" (see BLE brief, p. 14) than one where "statutes preclude judicial review." As noted above, the instant case is one in which the administrative agency declined to exercise its statutory discretion because it erroneously concluded that it had none. Hence *Ludecke* v. *Watkins,* where the discretion was exercised, and was not mistakenly self-inhibited, is not inconsistent with the position of petitioners herein.

With respect to the Mediation Board's contention (its brief, p. 12) that the *Switchmen's Union* decision represents a finding that judicial review is "precluded" by the Railway

Labor Act, it is sufficient to refer to the complete refutation in petitioners' original brief (pp. 24-26).

Both briefs of respondents seek to distinguish *United States ex rel. Trinler* v. *Carusi*, 166 F. (2d) 457 (C.C.A. 3d, 1948) from this case in order to avoid the conflict pointed out by petitioners in their original petition and brief (pp. 10-11, 53-55). Respondents succeed only in pointing out non-essential factual differences. Essentially the two cases are in direct conflict, as demonstrated in petitioners' brief. Indeed, in attempting to deny the conflict, the Mediation Board clearly demonstrates its existence, for the Mediation Board asserts (its brief, p. 13, footnote 4) that prior judicial interpretations of the deportation statute involved in the *Trinler* case denied review (except to the limited extent possible in habeas corpus proceedings), and therefore the Mediation Board contends that the Circuit Court should have held the broader review there sought to be "precluded" by the statute. In other words, the Mediation Board is contending for "statutory preclusion" by judicial interpretation in the *Trinler* case, just as it is in this case; and the refusal of the Circuit Court to adopt that contention establishes the conflict with the acceptance of it by the Court of Appeals in the instant case. The fact that the *Trinler* case was subsequently abated does not detract from the decision's authority as an expression of the considered opinion of a distinguished Circuit Court. As noted in petitioners' original brief (p. 51), the decision in the *Trinler* case has been followed by at least one District Court, located in another circuit. *United States ex rel. Cammarata* v. *Miller*, Civil No. 45-297 (S.D.N.Y. 1948). Clearly the purpose of this Court's rule authorizing certiorari in case of conflict between Circuit Court decisions is to avoid unnecessary confusion. This is an important matter, and confusion is certain to result unless this Court takes jurisdiction to resolve the conflict and establish boundaries as to the availability of judicial review under the Administrative Procedure Act.

CONCLUSION.

In view of the foregoing considerations, it is respectfully requested that this Court grant the writ of certiorari sought in the petition, and that, upon review of the decision of the United States Court of Appeals for the District of Columbia, said decision be reversed, and the cause remanded for further proceedings consistent with the opinion of the Supreme Court.

Respectfully submitted,

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September 15, 1948

SUPPLEMENT A.

October 12, 1946

Mr. Robert F. Cole, Secy.,
National Mediation Board,
Washington, D. C.

Dear Sir:

The well-nigh unanimous chorus of disapproval and condemnation being voiced by the engineers employed on the Western Division of the Atlantic Coast Line Railroad against the certification in case No. R-1662 of the Brotherhood of Locomotive Engineers as the "duly designated and authorized" representative of the class or craft of engineers employed on the Atlantic Coast Line Railroad Company, including the Western Division thereof, compels me to formally protest against, and except to, this certification by the Board.

The impropriety of the Board's action, when regard is had for the circumstances of this certification, is so apparent that I desire to assure myself regarding the basis for this action.

Shortly prior to April 30, 1946, the BLE invoked the services of the Board for the purpose of investigating an alleged representation dispute among the locomotive engineers employed by the Atlantic Coast Line Railroad, including the Western Division. I am advised that the authorizations filed by the BLE with the Board in support of the alleged dispute were executed by the engineers employed on the Northern and Southern Divisions only of the ACL RR. The engineers employed on the Western Division lent no support to the claim that a dispute existed regarding their choice of a representative.

In the Board's letter of April 30, 1946, addressed to Mr. W. S. Baker, Chief of Personnel of the ACL RR, and to myself, the Board formally acknowledged receipt of the BLE's application, and then followed this acknowledgment by an explanation which reads as follows:

> "Records of the Board show that all locomotive engineers of the Atlantic Coast Line are presently represented by the Brotherhood of Locomotive Engineers

with the exception of the Western Division which, prior to January 1, 1946, was the Atlanta, Birmingham & Coast Railroad. It is the Board's consistent policy in representation elections to require that all employees in a particular craft or class on a carrier are entitled to participate in any determination of the representative of the craft or class, for the purposes of the law."

I understand the Board to say by this statement that when deciding whether to entertain the BLE's application, it considered itself required by law, to-wit, the Railway Labor Act, to combine all of the engineers employed by the ACL RR, including the Western Division thereof, into one craft or class, and be represented by one representative.

It is reasonable to assume that the Board is prepared to explain and justify its actions in any performance of its duties under the Railway Labor Act, and I accordingly ask to be favored by a clear statement from the Board whether my understanding of the reason for the Board entertaining the BLE's application, as set forth in the second paragraph of the Board's letter of April 30, 1946, is correct. If my understanding is in error in any respect, I shall, of course, wish to be put at rights.

Very truly yours,

D. B. Robertson /s/

SCP:CG

SUPPLEMENT B.

October 16, 1946

Mr. D. B. Robertson, President,
Brotherhood of Locomotive Firemen and Enginemen,
Cleveland, Ohio.

Dear Mr. Robertson:

This will acknowledge your letter of October 12, 1946, requesting a statement from the Mediation Board of the reasons for combining all of the engineers employed by the Atlantic Coast Line Railroad Company, including the Western Division thereof, into one craft or class for pur-

poses of representation under the Railway Labor Act as certified by this Board on August 27, 1946, Case R-1662. Your letter will be called to the Board's attention.

Very truly yours,

Robt. F. Cole /s/
Robert F. Cole,
Secretary,
National Mediation Board.

SUPPLEMENT C.

NATIONAL MEDIATION BOARD
Washington 25, D. C.

November 13, 1946
Case R-1662

Mr. D. B. Robertson, President
Brotherhood of Locomotive Firemen & Enginemen
Cleveland, Ohio

Dear Mr. Robertson:

Further reference is made to your letter of October 12, 1946, Case R-1662, representation dispute among locomotive engineers employed on the Atlantic Coast Line Railroad Company, including the Western Division thereof (formerly the Atlanta, Birmingham & Coast Railroad).

Your letter was considered by the Board in executive session today and this letter is written to advise that the statement contained in our joint letter of April 30, 1946, addressed to the carrier and yourself, as quoted in your letter, is correct and is based on prior decisions of this Board.

In direct response to your inquiry as to whether the Board considers itself required by the Railway Labor Act to combine all of the engineers employed by the Atlantic Coast Line Railroad, including the Western Division thereof, into one craft or class for representation purposes, the answer is in the affirmative. In this connection you are respectfully referred to page 15 of the Findings in Case R-690 wherein reference is made to the Board's letter of

February 17, 1937 to Mr. Walber of the New York Central Railroad Company, in an earlier case, R-161, as well as the specific Findings in Case R-690, copy of which is enclosed.

By direction of the NATIONAL MEDIATION BOARD.

Robt. F. Cole /s/
Robert F. Cole
Secretary

Enclosure

SUPPLEMENT D.

Excerpts from Decision of National Mediation Board in Case No. R-690.

(Representation of Employees of the New York Central RR Co. May 27, 1941)

(This case is that referred to by the Mediation Board in its letter of November 13, 1946 (Supp. C), and formed the basis for the Court decisions in *Switchmen's Union of North America v. National Mediation Board*, 77 App. D. C. 264, 135 F. (2d) 785 (1943); 320 U. S. 297 (1943))

(Mediation Board's mimeographed decision, page 2):

"ISSUES

"The Trainmen contend that the various lines of roads constituting the Railroad Company are not separate and independent operating units or carriers as they were before becoming consolidated under the Railroad Company, but that such lines now constitute a single carrier, managed under a plan of consolidation by the Railroad Company, effected by acquisition thru leases of the properties or by purchase of the capital stock of the companies owning the separate lines of road concerned and the integration of these separate properties and roads into a single railway transportation system controlled and operated by the Railroad Company; that this system as a whole is a single 'carrier' within the meaning of the Railway Labor Act; and that, in view of Sections 1, Sixth, and 2, Fourth

and Ninth of the Act, the Board is bound to include in the eligible list all the employees of a craft or class of such a carrier for the purpose of determining their representative.

"The Switchmen contend that various separate properties or lines operated by the Railroad Company are separate carriers for the purpose of representation within the meaning of the Railway Labor Act; that the Act permits the Board, in its discretion, to divide a 'carrier' into geographical areas, separate lines, or regions and that the employees embraced within a class or craft in the service of the Railroad Company of each such line or region constitute separate crafts or classes of employees for purpose of representation."

(Mediation Board's mimeographed decision, pages 15-16):

"With reference to the argument of the Switchmen based on the issuing of certificates of representation applying only to the employees in the service of a particular territorial division, region or part of the Railroad Company, the Board must again direct attention to the circumstances that in those cases [certain cases previously cited by the Board] eligible lists had been agreed upon between the contending parties. In none of these cases was there a controversy over the issue of law as now raised in this case.

"Indeed with reference to the New York Central Railroad Company itself in answer to a letter of Mr. Walber, with reference to Case R-161, the Board wrote as of February 17, 1937, as follows:

'It has been the view of the Board that where a dispute exists within a class or craft, the law gives us no discretion, but to make a determination of choice of representative for the entire class or craft for the entire railroad involved regardless of presently existing agreements, unless all parties to the present dispute agreed otherwise. The controlling ruling in this regard was made in the Nickel Plate case where the Switchmen's Union of North America sought to take over the representation of the men employed in the Buffalo and Cleveland yards. I am

attaching a copy of our ruling in that matter. Of course, all the parties can agree to divide up the System for the purpose of separate agreements but if any one dissents from that view the determination must be made for the entire group and the entire System.'

"As the Board views the subject under consideration, it feels bound to conclude that no issue has been raised in this case as to what is a craft or class under the Railway Labor Act. There is no dispute that the class or craft of 'yardmen' embraces foremen or conductors, helpers or brakemen, switchtenders and car retarder operators. The issue actually raised is simply a question as to whether this craft or class of 'yardmen' may be broken into separate groups on the Railroad Company with a resulting right in any group to demand separate group representation. In the two court cases referred to (B.R.T. vs. National Mediation Board, 88 Fed. (2) 757, and Brotherhood of Railway & Steamship Clerks, etc. v. Nashville, Chattanooga & St. Louis R. R. Co., 94 Fed. (2) 97), the question before the Courts involved the subject of what constituted a class or craft but did not involve the splitting of a well-recognized craft or class of employees essentially along geographical lines; i.e., by yards, divisions, subsidiary roads or companies, or regions of a parent operating company.

"In further elaboration of its opinion on the subject as given in the First Annual Report, the Board is of the view that the idea of collective bargaining with a carrier denotes the collective participation of all the carrier's employees included in a single craft or class in its negotiations with the carrier by the method of representation. The word "collective" denotes singleness of agency in the same sense as the phrase 'e pluribus unum' symbolizes the national unity of the States. It connotes not a part or parts of a subject but a collection of all the parts into one body, which applied in the case before us, means singleness of representation with a single carrier. On this point the Act seems literally definite as it reads:

'The majority of any craft or class of employees shall have the right to determine who shall be the

representative of the craft or class for the purposes of the Act.'

"Note that the Act speaks of a majority of a craft or class determining 'who shall be the representative,' (not the representatives). The subjects 'craft or class' and 'representative' are both given in the singular number.

"The Board does not undertake to discuss the relative advantages or disadvantages which may inhere in single or divided representation respectively. Doubtless serious arguments may be made both for and against each method. The Act leaves the Board in no doubt that Congress had in mind single representation for each craft or class on each carrier when enacting it; and that had the Congress thought of sub-divisions of a craft or class or of a carrier as desirable methods of representation it would have made provision for their use.

"Finally, the Board concludes as a matter of law that the Railway Labor Act vests the Board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion.

"CONCLUSION

"The National Mediation Board, in view of all the evidence before it and the arguments presented to it in this case, has reached the conclusion that, since the New York Central Railroad Company and all of its operated subsidiaries, including the Boston & Albany Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Michigan Central Railroad Company, and the Toledo and Ohio Central Railway Company, is a single carrier within the meaning of and subject to the Interstate Commerce Act as established by the Interstate Commerce Commission, and so also constitutes a single carrier for the purposes of the Railway Labor Act, all of the employees of any

given craft or class, such as yardmen, in the service of a carrier so determined must therefore be taken together as constituting the proper basis for determining their representation in conformity with Section 2, Ninth, of the Railway Labor Act."